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No. 91-1113

In The

Supreme Court of the United States

October Term, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

MARCH FONG EU, et al.,

Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF RESPONDENT, CALIFORNIANS FOR A CITIZEN GOVERNMENT, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether California's term limits, which bar any legislator who has served more than four years in office from running for that office again for the rest of his or her life, violate the First and Fourteenth Amendment rights of candidates and their supporters.

2. Whether a law which applies equally to all members of the Legislature and state executive officers and featured certain individuals in the campaign in favor of passing the initiative violates the Bill of Attainder Clause.

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BRIEF OF RESPONDENT, CALIFORNIANS FOR A CITIZEN GOVERNMENT, IN OPPOSITION

STATEMENT OF THE CASE

Recent calls for legislative term limitation are the direct result of the relatively new phenomenon of career politicians. Neither the California nor United States Constitutions originally provided for term limits of any kind. The Twenty-Second Amendment to the United States Constitution, adopted in 1951, which limited the office of the Presidency to two terms, was motivated by a desire to prevent "dynasty building." Californians decided that the same kind of corrective action was necessary to curtail

"dynasty building" in the legislative and executive branches of state government.

To halt, or at least slow, the increase of political careerism at the state level, the People of California enacted the Political Reform Act of 1990 (Act) with the passage of Proposition 140. In so doing, the People expressly identified the ills sought to be corrected by the Act:

> "The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> "The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.
>
> "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted,

> state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served." Cal. Const. Art. IV, § 1.5.

In furtherance of its stated goals, the Act imposes three restrictions. First, the Act imposes term limits on legislators and state constitutional officers. The term limits are not retroactive. The petition addresses only the legislative term limits mandated by this provision of the Act. The other two restrictions limit the financial resources available to incumbents and redirects the legislative pensions to the Federal Social Security System.[1]

Despite brutal assaults on the initiative during the campaign, Proposition 140 received the popular support of California's electorate. Thereafter, having failed at the polls, those with a vested interest in staying in office filed suit in the California Supreme Court. Unsuccessful in the state's highest court, the state Legislature again flouts the will of the People and petitions this Court for review.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10.1 lists several criteria for the granting of a petition for certiorari. Petitioners here meet none of those requirements: there has been no split among the circuits, or among the state Supreme Courts; the decision below does not conflict with the opinions of

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[1] The pension provision is the subject of a petition for certiorari filed in this Court on January 8, 1992: *Californians for a Citizen Government v. Legislature*, No. 91-1114.

this Court; and petitioners present no new areas of law that have not already been settled by this Court. The arguments presented by petitioner represent only the desperation of incumbent legislators clinging to any slender reed of hope to perpetuate their time in office. For the reasons set forth below, this Court should deny the petition for certiorari.

A. There Is No Conflict with Other Decisions

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or of a Federal Court of Appeals. Petitioners have not, indeed cannot, point to any such conflict among the courts. The great majority of lower courts have never addressed the issue of term limits, and those few that have agree with the position of the California Supreme Court. In fact, petitioners themselves note that the West Virginia and Georgia Supreme Courts have upheld term limits. Petition at 7 n.7 (citing *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 927 (1976), and *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, *cert. denied*, 397 U.S. 149 (1970)). Term limits at the local level also have been upheld in *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897 (W.D. Mo. 1990), and *Cawdrey v. Redondo Beach*, Los Angeles County Superior Court No. YC004071, *appeal pending*, California Court of Appeal, Second Appellate District, Case No. B056816.

Each court that has ruled on the issue has come to the same conclusion: term limitations on elected officials are constitutional.

B. The Political Reform Act of 1990 Does Not Violate the First or Fourteenth Amendment

Petitioners contend that the Act violates the federal constitutional rights of equal protection and free speech. These contentions have no merit. Even assuming the ability to hold elective office is entitled to some constitutional protection, the Act does not impermissibly infringe upon it. Nor does the Act burden anyone's right to vote.

1. Simply Because Term Limitation Relates to the Election Process Does Not Automatically Subject the Political Reform Act of 1990 to Strict Scrutiny

Petitioners falsely assume that simply because term limitation is related to the election process the Act must be "strictly scrutinized" for equal protection analysis. Petition at 8-9; petitioner's appendix (App.) at A-20. While the " 'right to vote, per se, is not a constitutionally protected right,' " *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)), both "[the California Supreme Court] and th[is] . . . Court have had frequent occasion to reiterate . . . the 'fundamental' nature of the right to vote." *Gould v. Grubb*, 14 Cal. 3d 661, 670 (1975).

Notwithstanding the importance of the franchise, regulations or classifications impacting the right to vote are *not* automatically reviewed under the strict scrutiny standard. Countless election provisions detailing the mechanisms of the election process may have such minimal impact on fundamental rights that they can properly be judged under the rational basis equal protection standard. *Gould v. Grubb*, 14 Cal. 3d at 670; *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Thus, innumerable laws and regulations which minimally affect the right to vote are analyzed under the lower standard of review of "rational basis."

However, even if term limitation can be characterized as a "ballot access" issue, thereby affecting to some degree the related concerns of both candidates and voters, such laws are *still* not subject to the "strict scrutiny" level of constitutional analysis. Because of the automatic or rote nature of strict scrutiny examination, this Court has rejected that analysis or "litmus test" in favor of the *Anderson* balancing test when reviewing ballot access restrictions in cases involving both candidates and voters. *Anderson*, 460 U.S. at 789. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989) (Stevens, J., concurring).

Petitioners rely on *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and *Eu v. San Francisco County Democratic Central Committee* to support their argument that strict scrutiny combined with the "least drastic alternative" analysis is properly used in this case. Neither is properly applied. As the California Supreme Court stated in its decision:

> "[I]t seems clear the high court in *Eu [v. San Francisco County Democratic Central Committee]* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis." App. at A-20 (citing *Eu*, 489 U.S. at 222-25).

Thus, the court below concluded that *Eu* is probably inapposite. App. at A-20. Furthermore, *Illinois State Board* was decided prior to *Anderson*. As the most recent pronouncement on the issue, *Anderson* must be deemed controlling. Nevertheless, the court below covered all bases by stating that "it is unlikely we would reach a different result applying strict scrutiny to evaluate Proposition 140." App. at A-20.

In *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989), which was cited with approval by the California Supreme Court (App. at A-20), the Ninth Circuit stated that in ballot access cases,

> "heightened scrutiny is not the rule. . . . Indeed, not since 1979 has the Supreme Court invoked 'strict scrutiny' to decide a ballot access case. . . . At other times, the Court has espoused such a level of scrutiny, only to abandon it upon application.
>
> "And in its two most recent forays into the ballot access arena, the Court has forsaken even the appearance of allegiance to strict scrutiny by neglecting even to utter its name." *Erum*, 881 F.2d at 692 n.7 (citations omitted).

Petitioners' talismanic incantation of "strict scrutiny" should not persuade this Court to abandon the balancing test outlined in *Anderson v. Celebrezze*, 460 U.S. at 786. This Court explained the balancing test as follows:

> "[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

Application of the correct equal protection analysis demonstrates that the Act is constitutional.

a. An Incumbent Has No Fundamental Right to Seek Reelection

Petitioners do not expressly state which fundamental right of incumbents is implicated by the Act. Indeed their best defense may well be ambiguity because no fundamental right *is* implicated. If petitioners claim that incumbent legislators have a fundamental right to seek elective office, and thus contend that a heightened level of scrutiny is appropriate, such a statement has no grounds in

the law. The right to hold public office, by itself, is not a fundamental right.

In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court struck down a Texas filing fee law which required candidates for public office in primary elections to pay a potentially significant filing fee to gain access to the ballot. However, this Court did *not* invalidate the law because it infringed upon a person's interest in seeking public office:

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Id.* at 142-43.

This Court focused instead on the right to vote, recognizing that an impact on the right to seek office was related to the right to vote:

> "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143.

The law was stricken because the significant amount of the fees at issue directly impacted the rights of voters. This Court held that the "limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system" and who did not have the money to contribute toward payment of those costs. *Id.* at 144. This Court concluded that such an *economically* based restriction upon the franchise violates the Federal Constitution because it subjected the right to vote to a

monetary qualification. Such an *economic* burden on the right to vote, the Court held, required a compelling state interest which did not exist.[2]

Bullock and its progeny belie petitioners' assumption that the right of candidacy, standing alone, is a fundamental right. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny' "); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied*, 113 L. Ed. 2d 241 (1991) ("[c]ontrary to appellant's assertion, the right to run for public office, unlike the right to vote, is not a fundamental right"); and *Zielasko v. State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989) ("contrary to Zielasko and Bowman's assertions, running for office is not a 'fundamental right' "). Because the right to candidacy, in and of itself is not fundamental, the state's interests need only be legitimate to outweigh petitioners' ability to run for reelection in perpetuity.[3]

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[2] Because *Bullock* was decided 11 years before *Anderson*, the analysis follows the old strict scrutiny language, rather than the modern balancing test applied to ballot access cases.

[3] *See also Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, this Court upheld a California statute which expressly prohibited placement on the ballot of the name of any independent candidate who had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. This Court noted that the law was "an absolute bar to candidacy, *and a valid one.*" *Id.* at 737 (emphasis added). It is especially notable that *Storer* upheld an "absolute bar to candidacy" at a time well before this Court adopted the more lenient *Anderson* balancing test.

b. The Act Does Not Unconstitutionally Impair the Right to Vote

As the second prong to their attack, petitioners claim that the rights of those who wish to vote for incumbents (assuming those incumbents continue to be reelected for the full number of terms allowed under the Act) are unconstitutionally impaired. Petition at 14-16. Again, petitioners fail to grasp the correct analysis.

Notwithstanding the fact that the right to vote has been characterized as fundamental, that right is not absolute. *See Rivera-Rodriguez*, 457 U.S. at 9 (Puerto Rico law upheld which provided that if a commonwealth legislator died or resigned in office, the party of which the vacating legislator was a member had the right either to fill the empty seat outright, or hold an election for the seat, with only party members eligible to vote). The plaintiffs in that case argued that all voters had an absolute right to cast votes in the election to fill the vacant legislative seat. The Court, in upholding the law, stated that "this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one.' " *Id.* at 9 (citations omitted). *See also Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 95 (7th Cir. 1982).

The court below, in considering *Rivera*, determined that this Court gives "wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in an even-handed manner without discriminating against particular citizens or classes of citizens." App. at A-21. The court below then correctly concluded that the Act's term limitations satisfy that standard. *Id.*

Thus, incidental infringements of that right are valid and permissible. *See Bullock; Clements* (in ballot access cases, *only* laws which affect voting rights by making distinctions on the basis of *wealth,* on the basis of the *political viewpoint* of the candidates excluded, or on the basis of *some suspect class* will be given close scrutiny). In fact, from a technical standpoint, all ballot access restrictions affect to some degree some individual's ability to vote for a particular candidate who may be excluded by the ballot restriction.

However, this fact alone is insufficient to create an unconstitutional infringement upon voting rights. Were the case otherwise, *all* ballot access restrictions would be subject to almost certain invalidation. Petitioners state that Melissa Eddy has voted for petitioner Ed Davis in the past and would like him to continue to be reelected. Petition at 11. Therefore, petitioners argue, Ms. Eddy's right to vote is unconstitutionally impaired by term limits. It is interesting to note, however, that while his district, predominantly located in Ventura County, decided to reelect Senator Davis, county residents also favored Proposition 140 by 52.7% to 47.3%. California Secretary of State, Statement of the Vote for November 6, 1990, at 65. Apparently both Ms. Eddy and Senator Davis are unconcerned with the voting rights of those who supported Proposition 140. Moreover, would the rights of Ms. Eddy be unconstitutionally impaired if Senator Davis moved out of state or was otherwise disqualified from running? Of course not. Ms. Eddy's rights are no more impaired than the rights of all Californians who voted for Paul Carpenter for the State Board of Equalization. Mr. Carpenter received the highest number of votes and

yet, as a convicted felon, was ineligible to serve. *Lubin v. Wilson*, 232 Cal. App. 3d 1422 (1991); Cal. Const. Art. VII, § 8. Under petitioners' strained analysis, all those who voted for Mr. Carpenter would be able to state a claim under the First Amendment. In any event, federal precedents demonstrate there is no right to vote for a particular candidate. *See Stiles v. Blunt*, 912 F.2d at 266 n.10; *Zielasko v. State of Ohio*, 873 F.2d at 961.[4]

Petitioners then refer to Ronald Reagan's 1980 presidential victory as evidence that members of the electorate may coalesce behind a particular candidate, again implying that such personal loyalty creates First Amendment rights. Petition at 14-15. What petitioners neglect to mention is that President Reagan, despite still enjoying substantial popularity through the end of his second term, could not run again for the Presidency. Not then, not ever again. United States Constitution, Twenty-Second Amendment. Citizens of the United States amended their Constitution so that no president, no matter what his personal following, could serve more than two terms in that office. In this case, citizens of California amended their constitution so that no legislator or constitutional

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[4] Although *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897, was resolved in the context of the federal Voting Rights Act, the language in that case is instructive:

> "In the present case plaintiffs principally complain that they are being denied a full opportunity 'to elect representatives of their choice.' . . . The simple answer . . . is that *all* members of the Kansas City electorate are being deprived of the right to elect council members for more than two consecutive terms." *Id.* at 899 (emphasis in original).

officer could serve more than two terms in that office. Yet petitioners do not suggest that the Twenty-Second Amendment nullified part of the First Amendment, or that the Act is unconstitutional as applied to statewide constitutional officers in California. Petition at 11 n.11. If petitioners' analysis were valid, then term limits for members of the executive branch would also be subject to a First Amendment right to vote challenge, yet petitioners deliberately avoid making that argument. *Id.* As meritless as petitioners concede the right to vote argument is as regards executive officers, so too is the argument meritless as regards legislative representatives.

Respondent does not claim that the right to vote is never a constitutionally protected right. However, under the proper equal protection analysis, the right to vote can be subject to reasonable governmental limitations, provided these limitations are content neutral and do not make economic or associational classifications. *Anderson*, 460 U.S. at 792-93. Petitioners' apparent position is that even though the Act is content neutral, creates no wealth-based classification, does not target a particular suspect class, does not target persons on the basis of political affiliation, and does not affect any particularized voter group, this Court should nevertheless strike the law as invalid.[5] Petitioners' position cannot be seriously

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[5] Petitioners suggest that a flaw in the Act is that it affects even legislators who served as independent and minority party members, out of the legislative mainstream. Petition at 15. Of course it does. To be written otherwise would be a content-based restriction on speech. Petitioners again make a salient point: the Act affects all officeholders equally--regardless of political viewpoint, race, gender, age, or any other possible classification.

considered, as the Act has placed at most an incidental burden upon the right to vote.

2. Term Limitation Advances Significant Public Policy Interests Which Far Outweigh Petitioners' Interests in Holding Public Office in Perpetuity

Ironically, petitioners' error in failing to apply the correct equal protection analysis is immaterial. Because even if this Court applied the highest standard of review, the Act would still easily meet the constitutional requirements. The Act provides the least restrictive means of preventing entrenched incumbents from assuming perpetual political control of state government, while ensuring continued access to public office by newcomers to the political process and encouraging civic participation in government.

The Act is an even-handed, nondiscriminatory law designed to meet important goals. It is designed to encourage civic participation by the citizens of California, to open the political process, to prevent entrenched incumbencies,[6] to discourage "bossism" and corruption,

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[6] The substantial advantages of incumbency held by California legislators were set forth as factual findings in a recent federal trial:

> "By virtue of the trial, the court has found that, as a general matter, incumbents have a significant natural advantage over challengers. Moreover, . . . an elected official can, and most do, (continued)

to foster the creation and implementation of new ideas for government, and to ensure that a significant variety of candidates can have an opportunity to serve in state government. Petitioners state that only experienced politicians have an incentive to speak as candidates and have the financial means to do so. Petition at 13 n.12. This is precisely the evil that term limits combat. The Act removes career politicians from that privileged class of money and power, opening up the field of candidates to those who do not have all the advantages of incumbency.

The compelling state interests supporting term limitation are already documented in case law and elsewhere. This established record should not be surprising in light of the fact that term limits are hardly a novel concept. "Over the years, term limits for Congress have been endorsed by the likes of Thomas Jefferson, Abraham Lincoln, Harry Truman, Dwight Eisenhower, and John F. Kennedy." CATO Institute, *Policy Analysis*, John H. Fund, "Term Limit~~ation: An~~ Idea Whose Time Has Come" 3 (Oct. 30, 1990). The policy reasons in favor of term limitation were amply explored in the court's decision below. The California Supreme Court accepted the arguments that

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raise substantial amounts of money each of the years of incumbency, while as a general matter challengers cannot, and generally do not, do so." *Service Employees International Union, AFL-CIO, CLC v. Fair Political Practices Commission*, 747 F. Supp. 580, 588 (E.D. Cal. 1990), appeal pending, Ninth Circuit Court of Appeals, Case No. 89-0433LKKJFM.

> "the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control." App. at A-26.

Furthermore, the court below firmly recognized the advantages that are inherent in the incumbency: "Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates." App. at A-29.

Term limitation is popularly supported by citizens nationwide and, as evidenced by passage of the Act, is similarly supported by the electorate of California. This support is justified by the numerous benefits from term limitation. Because term limits would pass even the more stringent test of advancing a compelling state interest, *a fortiori*, it would pass constitutional muster under the proper *Anderson* balancing test.

Petitioners next contend that the Act is not narrowly tailored to achieve its goals and suggest that the problem of incumbent advantages can be solved using less drastic measures. Petition at 16-19. Ignoring for the moment that petitioners are again applying the wrong equal protection

test, the Act is indeed narrowly tailored. Petitioners suggest that a lifetime ban is too strict and that the proponents should have imposed a limitation on successive terms only. The proponents rejected limits on consecutive terms because such a ban would only give rise to the problem of "tandem candidates" who would simply trade off running for the same seat every six or eight years.[7] This would not address the state interest in *ensuring* a reduction in inherent incumbent advantages.[8] App. at A-30. The court below held:

> "Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the 'advantages of incumbency' captured through past terms in office. The remainder of petitioners' suggested 'alternatives' essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford 'career politicians' with independent resources little incentive to voluntarily terminate public service." App. at A-30.

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[7] The court below cited as an example of the phenomenon the circumstance that arose when George Wallace became subject to Alabama's gubernatorial term limits. His wife Lurleen ran in his place and served until her death mid-term. George Wallace was reelected at the end of her term. App. at A-30.

[8] Although the Attorney General and Secretary of State, both themselves subject to term limits, argued for consecutive term limits, petition at 19, intervenor Californians for a Citizen Government, the author of the measure, argued for the lifetime ban, which construction was accepted by the California Supreme Court.

Petitioners then argue that the election process itself is the least drastic alternative: that if voters do not like a candidate, they can vote that candidate out of office. Petition at 19. The California Supreme Court rejected this argument because the incumbent advantages make that statement blatantly untrue. App. at A-29.

The court below relied in part on language in *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 927, in which the Virginia Supreme Court upheld a two term limitation on the Governor's Office, specifically rejecting the claim that the law was undemocratic. The court stated:

> "The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.
>
> " . . . The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raised fears of an entrenched political machine which could effectively foreclose access to the political process.
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> " . . . [I]t has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. . . . While elections are won by 51% of the vote, all of the people of a state must be served. Meretricious policies which sacrifice the well-being of economic, social, racial, or geographical

> minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." *Id.* at 611-12 (citations omitted).

Numerous states impose term limitations on government officials,[9] and the United States Constitution itself imposes a lifetime two term limitation on the office of the Presidency. If such limitations were undemocratic, they would not likely be so pervasive. *See* Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 Ohio St. L. J. 773 (1988).

The court below held that "many, if not all, of the considerations mentioned in *Maloney* (*e.g.*, eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch." App. at A-27. The court concluded that *Maloney*'s analysis was pertinent to the decision before it, and that "permanent incumbency limitations are supported by legitimate and compelling considerations." App. at A-28.

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[9] The following states have term limitations on governing officials: Alabama, Alaska, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d at 587, *cert. denied*, 397 U.S. 149.

Further, such limitations do more than prevent entrenched incumbencies. They ensure a continuing diversity in the management and running of government. Running for office traditionally has been viewed as a civic duty and honor. Farmers, business men and women, and retired persons are encouraged to run for office, bringing with them the benefit of their particular experience and viewpoint, and a desire to contribute to the growth of the constituency they serve. After completing public service, each would then step back to allow others to do the same. This process ensures a wide range of political opportunity for the citizenry and a large scope of experience from which to evolve and enhance the art of governance: "Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic." Tribe, *American Constitutional Law*, § 13-18, at 1097 (2d ed. 1988). Hence, the limitations reflected by the Act promote the democratic process and is in the public interest.

Petitioners argue that term limits were enacted to "remove incumbents based on the content of their message and the way in which they vote," resulting in a situation where "[a]nyone with fresh ideas is welcome. Those whose 'old ideas' are the fruits of experience are not." Petition at 13. Nothing in the Act, either facially or as applied, restricts speech on the basis of content. New candidates may well have old ideas. New candidates may still be sponsored by special interest groups. Nothing in the Act prevents that. And if *new* candidates with old ideas who cater to special interest groups cannot get

elected, that again evidences the People's contention that the only reason *old* candidates with old ideas who cater to special interest groups get elected is because of the advantages inherent in the incumbency.

A balancing of any injury caused to petitioners against the interest of California in enacting the Political Reform Act of 1990 demonstrates that the state's interest substantially outweighs any incidental burden on petitioners' rights. Petitioner-legislators have no fundamental right to hold office indefinitely; and voters are not prevented from voting for another candidate who shares their views.

> "[I]t would be anomalous to hold that a statewide initiative measure aimed at 'restor[ing] a free and democratic system of fair elections,' and 'encourag[ing] qualified candidates to seek public office' (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency." App. at A-31.

In view of the state's weighty interest in preserving and encouraging diversity in government and in preventing entrenched incumbencies, petitioners' arguments are without merit and the petition for certiorari should be denied.

C. The Political Reform Act of 1990 Does Not Violate the Bill of Attainder Clause

Article I, Section 10, Clause 1, of the United States Constitution states "[n]o State shall . . . pass any Bill of

Attainder." The test for a bill of attainder is whether a legislative act applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315 (1946) (congressional prohibition of payment of salaries to three named federal employees because engaged in subversive activities violated bill of attainder clause). Furthermore, this Court has applied a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977).

The California Supreme Court held that Proposition 140 met none of the three possible tests for a bill of attainder violation: neither the historical, functional, nor motivational tests were met. App. at A-33. The historical test was not even implicated because no cases involving term limits as punishment exist. *Id.* As for the functional test, the court below held that "the measure itself expresses broad, *nonpunitive* purposes, namely, '[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office' by limiting 'the powers of incumbency.' (Cal. Const., art. IV, § 1.5.)" App. at A-33 (emphasis in original).

The Act cannot remotely be described as a bill of attainder. Evaluated in terms of its asserted purposes, the Act must be held to be an act of nonpunitive policy making. It is not a partisan measure; it equally limits terms of Republicans, Democrats, and Independents. The Act does not discriminate on length of service; it limits

terms of legislators who have served for over two decades as well as those who have served only a single term. It limits terms of legislators who opposed passage of the Act, and those who supported it. The Act does not single out any particular legislator or any particular group of legislators as subject to its provisions. As the court below noted:

> "[T]he ballot arguments contain no indication of an intent to *punish* those individuals for any particular past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals, but in our view such measures would not constitute improper bills of attainder unless an intent *to punish* such individuals clearly appears from their face, or from the circumstances surrounding their passage." App. at A-34 (emphasis in original).

If petitioners are claiming that the entire state Legislature plus the constitutional offices affected by the Act compose a discrete group subject to punishment, then they are expanding the case law beyond its stated boundaries:

> "[T]he prohibition against bills of attainder, it surely was not intended to . . . invalidat[e] every Act of . . . the States that legislatively burdens some persons or groups but not all other plausible individuals. . . . [W]hile the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' . . . it does not do so by limiting [States] to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." *Nixon*, 433 U.S. at 471 (footnotes omitted; citations omitted).

The Act was intended not to punish petitioners Brown and Roberti, but to address fundamental ills in the state's system of governance. Petitioners Brown and Roberti were featured in the campaign in support of the Act for the simple reason that they have high visibility positions, significant political power, and statewide name recognition. It is perhaps a measure of the attitude of the long-term politicians petitioning this Court that they believe the People of California passed an Act affecting 120 legislators, state constitutional officers, the legislative budget, and the legislative pension plan just to remove two individuals from office. The Act simply does not translate into the type of personalized punishment prohibited by the United States Constitution.

Moreover, none of the cases cited by petitioners are remotely analogous to the context presented here. In each of those cases this Court noted that the manifest purpose of the prohibition of bills of attainder is to control the power of the Legislature to punish individuals or a discrete group of people for certain attributes or associations. The Act in issue here is antithetical to this idea. The Act was enacted by the People to control their own representatives. The court below held that " ' "[i]t is clear that general legislation such as this . . . *aimed at the office* . . . rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder." ' " App. at A-34 (emphasis in original).

A key point was made by the petitioners themselves: " 'The deprivation of any *rights* . . . may be punishment.' " *United States v. Brown*, 381 U.S. 437, 448 (1965) (emphasis added) (law making it a crime for members of Communist Party to serve as officers of labor unions violates bill of

attainder clause). Petition at 21. Residents of California may run for office and once elected, barring any specific disqualifications, they may continue to serve. But that right to serve exists only so long as they discharge the terms of their employment. Because sovereignty resides in the People of California, the People have the right to alter those terms of employment. Legislators serve at the will of the People, not at their own pleasure.

Petitioners have failed to show that the Act was aimed solely at specific individuals, that it was motivated solely by the desire to punish specific individuals, or that punishment is the effect of the passage of the Act. The court below concluded that

> "[a]lthough it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and *punish* those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the federal Constitution." App. at A-34 (emphasis in original).

Therefore the bill of attainder claim made by petitioners is meritless and the petition should be denied.

CONCLUSION

The freedoms of speech and association guaranteed to all Americans by the First and Fourteenth Amendments are vital rights that must be zealously protected by this Court. It is equally within the mandate of this Court

to uphold the Constitution so as to protect our precious freedoms from subversion for personal gain and the self-interest of legislators at the expense of the governed. The People of California have made clear their position: term limits properly and effectively further the fundamental policies of a representative democracy. The Political Reform Act of 1990 represents the People's selection of a particular type of governmental reform to solve significant problems in their state's government. It was not an attempt to "punish" any particular person.

The nominal "representatives" of the People who chose to challenge this reform have lost at the polls and in the state's highest court. They now petition this Court as a means to escape the will of the People. The arguments presented have no more force now than when rejected by the People and the Supreme Court of California. The petition for certiorari should be denied.

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Respectfully submitted,

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